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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 WASHINGTON UTILITIES AND)

TRANSPORTATION COMMISSION,)

4)

Complainant,)

5)

vs.)

6)

OLYMPIC PIPE LINE COMPANY,)

7 INC.,)

)

8 Respondent.)

9

10 A prehearing conference in the above matter

11 was held on February 15, 2002, at 2:05 p.m., at 1300

12 South Evergreen Park Drive Southwest, Olympia,

13 Washington, before Administrative Law Judge C. ROBERT

14 WALLIS.

15 The parties were present as follows:

16 WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, by DONALD T. TROTTER and LISA WATSON,
17 Assistant Attorneys General, 1400 South Evergreen Park
Drive Southwest, Post Office Box 40128, Olympia,
18 Washington 98504.

19 OLYMPIC PIPE LINE COMPANY, INC., by STEVEN C.
MARSHALL, Attorney at Law, Perkins Coie, 411 108th
20 Avenue Northeast, Suite 1800, Bellevue, Washington
98004 (via bridge), and PATRICK W. RYAN, Attorney at
21 Law, Perkins Coie, 1201 Third Avenue, Suite 4800,
Seattle, Washington 98101 (via bridge.)

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23 TESORO REFINING AND MARKETING COMPANY, by
ROBIN O. BRENA and DAVID W. WENSEL, Attorneys at Law,
24 Brena, Bell & Clarkson, 310 K Street, Suite 601,
Anchorage, Alaska 99501 (via bridge).
Kathryn T. Wilson, CCR
25 Court Reporter

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TOSCO CORPORATION, by EDWARD A. FINKLEA and
CHAD M. STOKES, Attorneys at Law, Energy Advocates,
LLP, 526 Northwest 18th Avenue, Portland, Oregon 97209
(via bridge).

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P R O C E E D I N G S

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JUDGE WALLIS: Let's be on the record. This is a prehearing conference in the matter of Commission Docket No. TO-011472, which is in form a complaint by the Washington Utilities and Transportation Commission versus Olympic Pipeline Company relating to a request that Olympic has made for an increase in the authorized level of rates for the services it provides in transporting petroleum products. Let's take appearances at this time, and for convenience, let's begin in the hearing room.

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MR. TROTTER: This is Donald T. Trotter and Lisa Watson for commission staff.

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JUDGE WALLIS: For the respondent, Olympic Pipe Line Company?

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MR. MARSHALL: Steve Marshall for Olympic Pipe Line Company and Patrick Ryan.

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JUDGE WALLIS: For the intervenor Tesoro?

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MR. BRENA: This is Robin Brena and David Wensel.

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JUDGE WALLIS: And for the intervenor Tosco?

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MR. FINKLEA: Ed Finklea for Tosco.

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JUDGE WALLIS: We have begun this conference a little bit after the time that it was scheduled, first taking some time to establish a connection with

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1 the Commission's bridge line and then reviewing the
2 various matters that we have before us today. This
3 matter was initiated by a motion from commission staff
4 for an opportunity to discuss various procedural
5 issues. We then received a motion from the intervenors
6 to compel responses to discovery requests that the
7 intervenor has made, and without looking, Mr. Brena,
8 was that on your own behalf or both on behalf of you
9 and Mr. Finklea?

10 MR. BRENA: That was on Tesoro's behalf.

11 JUDGE WALLIS: Then we received responses
12 from the company to the staff motion and to the
13 intervenor's motion. We received those late this
14 morning. The response to the staff motion proposed a
15 schedule change, and following that, we received a
16 motion to limit discovery, and I believe that's all
17 that we have before us today; is that correct?

18 MR. MARSHALL: Yes, that's correct.

19 JUDGE WALLIS: In discussing our agenda for
20 this afternoon, we suggested that it would be
21 appropriate to begin with the scheduling motion and
22 have the parties' comments regarding that motion and
23 how it would affect the schedule, so I would like to
24 begin with that and ask Mr. Marshall to state the basis
25 for the motion, and if it is granted, how discovery

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1 would proceed. Mr. Marshall?

2 MR. MARSHALL: Thank you, Your Honor. Our
3 motion on the hearing schedule was the result of a
4 question by commission staff as to whether or not we
5 could adhere to the original schedule set in view of
6 the discovery issues and so on that were coming up. I
7 had a discussion with the Olympic Pipe Line Company
8 board of directors, and was authorized to submit a
9 revised schedule which would sequence the two dockets,
10 the one at the FERC and the one here with the WUTC, in
11 a fashion that was made in administrative efficiency to
12 allow the parties to physically be able to respond to
13 the discovery in an orderly way and then to have a
14 record available for the parties from the FERC
15 proceedings so that we could avoid the duplication of
16 effort.

17 What we proposed in our schedule was that we
18 would allow the FERC proceeding to go forward first.
19 Upon conclusion of that, the parties to this proceeding
20 would then have the opportunity to conduct a couple of
21 discoveries in light of all that had been produced at
22 the FERC, both in discovery here and in the record of
23 the hearing of the FERC.

24 The idea would be that hopefully that most,
25 if not all, of the information that would be required

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1 here would already have been produced at the FERC
2 proceeding and we would not have to redo that again, so
3 in the event supplemental discovery would be necessary
4 that there would be a time period that would allow that
5 to occur. We set a schedule, proposed schedule for
6 doing that in our motion that contemplated that the
7 WUTC hearings would start on Monday, October 14th, or
8 whenever the next date the commission had available,
9 and then the posthearing briefs would be due following
10 the time that the initial decision from the FERC
11 administrative law judge --

12 JUDGE WALLIS: Excuse me, Mr. Marshall. Our
13 reporter is having a great deal of difficulty hearing
14 you, and so am I. It would help if you slowed down a
15 little bit as well as keeping your volume up. It's
16 very difficult by telephone to get the visual feedback
17 that helps in keeping everything straight.

18 MR. MARSHALL: I apologize for not being able
19 to be there physically. We have a Bonneville Power
20 Administration meeting with people from all over the
21 region with trying to settle another large matter
22 before the Ninth Circuit, and I unfortunately had to
23 take a break from that for this, but this is also very
24 important, and I think that we have provided in our
25 response to commission staff's inquiry about the

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1 hearing schedule something that would be workable in
2 terms of saving time and allowing Olympic to physically
3 respond.

4 I understand from discussions with counsel
5 for intervenors that they have not had an opportunity
6 to discuss this with their clients, and we are, of
7 course, willing to make whatever accommodations to
8 allow them to consider this more fully, but the fact of
9 the matter is that Olympic finds itself unable to
10 physically respond to the multiple data requests from
11 both dockets and multiple hearings and depositions and
12 subpoenas duces tecum and the other discovery that's
13 coming our way in any kind of response would enable us
14 to do the job that needs to be done for these matters.

15 The sequencing, allowing one proceeding to go
16 first, seems to us to be the most logical thing to do
17 under the circumstances, so that's the proposal that we
18 pulled together after a consultation and authorization
19 from the board of directors of Olympic Pipe Line, and
20 in all of that, of course, we have done what be would
21 be required to do, which is we have agreed if that
22 schedule were to be adopted to waive the right to have
23 a decision made by the commission on August 1st, as
24 it's now set, to a later date. I believe that our
25 motion suggested that we would waive that to November

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1 29th, and that's also something that we have gotten
2 clearance from the Olympic board to represent to the
3 commission that we would indeed waive that if the
4 schedule were reset along the lines suggested.

5 With that, I think that that's the essence of
6 what we've proposed. The interim dates in terms of
7 deadlines following the FERC proceeding we've left open
8 because it's our hope that all the discovery that would
9 need to be done with very few exceptions would be done
10 in the course of the ongoing FERC proceeding.

11 JUDGE WALLIS: Mr. Marshall, can you in very
12 general terms indicate what the discovery schedule is
13 for that proceeding?

14 MR. MARSHALL: The discovery schedule for
15 that proceeding is ongoing now. The discovery in that
16 proceeding will end on June 14th, and I understand --
17 and I think we've tried to send a copy of the various
18 copies made in both this docket and the FERC that some
19 of the discovery requests from the FERC are exactly
20 duplicative of the discovery requests here.

21 For example, Mr. Brena's motion that he made
22 to compel discovery in this matter concerns discovery
23 data requests that are identical to the requests that
24 he has made at the FERC. Similarly, commission staff
25 has asked us to produce here, and I believe it's due

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1 now, then if not, in another day or two, all materials
2 that Olympic has produced to the FERC. So that
3 discovery is going on, and FERC staff is also
4 conducting discovery. All of the discovery that is
5 being conducted at the FERC the intervenors, of course,
6 are parties to the FERC proceeding so they will be
7 getting that in due course from that proceeding itself.

8 That discovery, of course, will also involve
9 both direct evidence from the FERC commission staff,
10 Olympic's rebuttal evidence, and then during the actual
11 hearing, it would involve cross-examination, and that
12 record and transcript would be available. We would
13 make copies for the commission staff and anybody else
14 who required a copy of that, but the discovery at the
15 FERC is as extensive as the discovery in any other
16 proceeding. It's very thorough, and we've tried to
17 attach some examples.

18 For example, Tosco's discovery requests of
19 the FERC is 12 pages of I don't know how many
20 questions, but they are quite detailed, and I believe
21 that the record after the FERC proceeding over the area
22 of transcript are available will be more than enough
23 for us here, but again, in the event that supplemental
24 discovery is necessary, we would be willing to provide
25 that.

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1 JUDGE WALLIS: What is the schedule of the
2 FERC hearing, Mr. Marshall?

3 MR. MARSHALL: The FERC hearing, as we've
4 indicated in our motion, will commence on July 9th, and
5 I don't know exactly how long that means to continue,
6 but posthearing briefs are due on August 6th, and then
7 the initial decision from the administrative law judge
8 is due October 22nd.

9 Our proposal begins the WUTC hearing on
10 October 14th in time to allow discovery following the
11 FERC hearing starting July 9th and yet gives plenty of
12 time to try to get the information to complete all of
13 its activities and issue an order by November 29th.

14 JUDGE WALLIS: Very well. I have the
15 commission's hearing calendar in front of me, and the
16 commissioners are not available during the weeks of
17 October 28, the entire month of November, and during
18 the weeks of October 14 and 21, there is another matter
19 in progress that would severely restrict their time
20 availability for a hearing in this matter.

21 One of the matters that is now committed to
22 the November period is one that was moved into that
23 time frame based in part upon the existing schedule for
24 this proceeding. The first three weeks in December
25 have no hearings scheduled. There are a few other

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1 matters, but it looks to me as though it is going to be
2 very difficult for the commission to adopt the hearing
3 schedule that you've suggested.

4 In addition, based on what we have seen
5 through the interim proceeding, it is likely that there
6 may be a number of significant issues addressed by the
7 parties in the general phase of this matter, and I
8 believe that the parties would like the opportunity to
9 brief those matters to their satisfaction, and I
10 believe the commission would like the opportunity to
11 review the record and the briefs in a way that would
12 allow the commission to prepare what it believes is a
13 satisfactory order sufficiently addressing each of
14 those issues, and I believe it's unlikely that four
15 weeks would be sufficient to accomplish that.

16 So based on that information, Mr. Marshall,
17 perhaps you do not have the authority to engage in this
18 kind of discussion, but it looks as though we would be
19 looking at hearings during the first two or three weeks
20 of December and that we would be looking at a February
21 time frame for service of an order.

22 MR. MARSHALL: I actually did speak to the
23 board about that possibility, and in the event -- which
24 is why I indicated in the parenthetical that we would
25 like to start the hearing on the 14th or whatever date

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1 the commission has available --

2 JUDGE WALLIS: Mr. Marshall, again, we are
3 really having trouble hearing you.

4 MR. MARSHALL: I did raise this possibility
5 with the board indicating that I knew the commission
6 was very busy and that we might have to accommodate the
7 commission's schedule, even if it were to be moved back
8 another month or two, and they gave me permission to
9 follow whatever was convenient to the commission.

10 There may be two options here. One would be
11 to start the WUTC hearings on the 1st of October
12 instead of the 14th, and the other would be to start
13 the hearings in December with the ruling in February,
14 and as much as we would like to have this resolved, I
15 think that one of the prospects that we had in mind --
16 and I don't mean to make any suggestions, but this is
17 something -- and I don't want to indicate anything that
18 would be -- but I do think that having the FERC
19 proceeding first and having testimony and the result
20 from that hearing might actually produce an overall
21 resolution of both cases by the parties.

22 But again, without making any commitment or
23 trying to pin anybody down, I do think this schedule
24 also holds promise for that. That was one of the
25 considerations the board was willing to defer what

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1 would otherwise be a statutory right to an earlier
2 decision made.

3 JUDGE WALLIS: Let me also share with you
4 that the commissioners' schedule is clouded with
5 another matter that does not have any hearing days but
6 does pose the possibility of occupying a substantial
7 part of their time schedule beginning on approximately
8 the 1st of October, so it's not just the weeks of the
9 14th and the 21st, and then they go into hearing on
10 October 28th and don't come up for air until just a day
11 or two before Thanksgiving, and then they are
12 relatively free of hearings in December, so I'm not
13 ruling it out. That would be a decision to be made by
14 the commissioners.

15 MR. MARSHALL: All we would want to add then
16 is we will be flexible, and, of course, we have to
17 abide by the commission's schedule, and we are in full
18 recognition of that and are willing to, out of
19 administrative efficiency and out of just the need to
20 have some sort of relief of a duplicative proceeding to
21 do that. If the commission needs to have the hearings
22 in December, we would also agree to that.

23 JUDGE WALLIS: Mr. Brena and Mr. Finklea, I
24 understand that you do not have authority from your
25 clients to speak either in favor of or against the

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1 request for a schedule change. With that in mind,
2 however, I would like to ask you some questions about
3 process. You have indicated that information about the
4 schedule of a continued hearing would be significant in
5 terms of your response to process questions, and I have
6 attempted to, through the presentation of Mr. Marshall
7 and my questions and observations, to give you as much
8 information as we have regarding that.

9 Looking at the question of a continuance
10 aside but looking only at the process, are you able to
11 present any comments on how you would think that that
12 would work in terms of your ability to gain through
13 discovery the information that you would need and in
14 terms of your ability to prepare for a hearing;
15 Mr. Brena?

16 MR. BRENA: Your Honor, I believe I
17 understood the question, and let me say that thank you
18 for the opportunity to address this issue with my
19 client before I formalize what Tesoro's position would
20 be with regard to Olympic's most recent motion
21 regarding scheduling.

22 That being said, I would like to make some
23 observations, and I don't mean by making these
24 observations to foretell Tesoro's ultimate position,
25 but to some degree, duplicative proceedings are

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1 necessary because you have separate jurisdictions with
2 separate enabling statutes with separate requirements
3 and regulations and rate setting for processes. So to
4 the degree that Mr. Marshall was suggesting that
5 evidence presented at FERC somehow be incorporated by
6 reference into a state proceeding, I'm not sure that
7 that would be a true efficiency gain. There are
8 significant issues before the state about methodology
9 and about other matters that are unique to the state
10 which do not need to be taken up before the FERC and
11 will not be taken up before the FERC, so I guess I
12 would just make that observation.

13 With regard to discovery, I would note that
14 currently, the WUTC proceeding is ahead of the FERC
15 proceeding, and the counsel and parties working on the
16 state proceeding have already reviewed quite a bit of
17 discovery. So we are talking about in the scheduling
18 suggestion going from the jurisdiction which is moving
19 the most quickly to resolve final rates to the
20 jurisdiction that would just wait until the lag
21 jurisdiction would resolve those rate issues. So I
22 guess from my perspective at least initially, anything
23 that we can do to get a full and fair adjudication and
24 have a permanent rate set in an expedited fashion, the
25 parties should be put to the test to do that.

1 With regard to his observations on
2 duplicative discovery, I agree that identical discovery
3 has been served on both sides. I don't agree that that
4 represents a burden to Olympic. If we ask for Document
5 A on the state side and Document A on the FERC side,
6 they can simply produce Document A, and we are willing
7 to accept Document A as production for both the state
8 request for Document A and the federal request for
9 Document A, and that is something that would have to
10 happen regardless. So I guess with regard to limiting
11 discovery, I mentioned that the state does have unique
12 issues that do require unique discovery. The discovery
13 between the two forms are not identical. So simply not
14 having any discovery in this proceeding and putting it
15 on hold for a month at a time, I guess I would be
16 concerned with that.

17 With regard to the underlying reasons and
18 process, I guess from my point of view, I have prepared
19 for this conference trying to prioritize discovery and
20 the depositions that I need in order to properly
21 prepare our direct case, which is currently due the
22 4th, and I understand that there is quite a bit of
23 discovery out there, and typically how these issues are
24 resolved are informally between counsel where they try
25 to restrict the data requests down to what the parties

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1 need and what sorts of time frames they need.

2 Certainly the discovery we've served, some
3 discovery we absolutely have to have prior to
4 developing our case. Some discovery we don't have to
5 have until the hearing date because it goes to
6 cross-examination of their experts. So from my
7 perspective, I would like to at this point keep the
8 hearing date that we have, and I would like to shift
9 the date when our case is due a couple of weeks to give
10 us an opportunity to get the discovery, and I would
11 like either through this process or informally to focus
12 Olympic on what we have to have to put our direct case
13 together and have them respond to that, and that seems
14 to me to be a rational and typical process to just
15 putting a whole proceeding in deep freeze for eight or
16 six months.

17 So those are observations that I've just
18 initially made. I would like, however, the opportunity
19 to discuss this with my client and perhaps come back on
20 Wednesday and propose an alternative schedule which
21 accomplishes the things that I've set forth and/or to
22 support or not to support what Olympic has suggested.

23 JUDGE WALLIS: Mr. Brena, in terms of
24 discovery that is presented both for matters here and
25 for matters under the FERC jurisdiction, would it be

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1 possible to submit one document rather than two so that
2 the company understands that there is no unnecessary
3 duplication and that, in fact, the differences, if any,
4 are clearly identified?

5 MR. BRENA: Certainly, and that's the type of
6 -- when we were on our bridge line without being
7 patched into the conference room, I acknowledged that I
8 thought that there was much that we could do with
9 regard to duplicative parties both between the
10 jurisdiction and to both parties, if there was just an
11 effort to informally sit down and do that, and for our
12 part, we have e-mailed and called and tried to
13 accomplish that and have been unable to. To answer
14 your question specifically, yes. If they could send us
15 one document, and that document could indicate that it
16 was a response to WUTC Tesoro Request No. 132 and FERC
17 request of the same number, that would be fine with us.

18 I would note however, Your Honor, that there
19 are protective orders in place in both jurisdictions
20 that protect the confidentiality information produced
21 that by my reading of those protective orders would not
22 prevent, and I would be certainly willing to sign
23 whatever stipulation is necessary to have Olympic send
24 me one piece of paper and on it say they are responding
25 to both jurisdictional requests.

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1 JUDGE WALLIS: Would it be possible for you
2 to serve one set of discovery questions indicating that
3 it applies to both jurisdictions except where there may
4 be different questions?

5 MR. BRENA: Much of our discovery is already
6 served, but to answer your question, essentially that's
7 what we did. We just sent two different copies,
8 slightly different. I think probably 60 of the 70
9 questions are identical.

10 MR. MARSHALL: But the problem is, of course,
11 Olympic --

12 JUDGE WALLIS: Mr. Marshall, we can't hear
13 you.

14 MR. MARSHALL: The problem we have, Your
15 Honor, is Olympic is represented by Washington D.C.
16 counsel in the FERC matter, and they are represented by
17 our law firm, Perkins Coie, in the Washington state
18 matter. We had no way of knowing that Tesoro had
19 served identical requests at the FERC level until
20 Mr. Brena filed his motion to compel discovery on what
21 turned out to be an identical set of material that he
22 had filed with the FERC. So until that time, we didn't
23 even know that there were duplications to be sent.

24 I'm sure a great deal of time was spent
25 trying to understand these questions and go through

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1 materials of our own before we were able to even figure
2 out that somebody was already working on that same set
3 of questions back in Washington D.C. That problem only
4 surfaced in a call yesterday or maybe the day before,
5 and of course, we responded to Mr. Brena's motion to
6 compel by indicating that they aren't due here until
7 today. They will obviously be produced at the FERC,
8 and the best way of handling that would be to have that
9 occur in the same time frame that the FERC has so that
10 we don't have -- we shouldn't have had to spend any
11 time on this at all, even responding to a motion to
12 compel, if there had been one set of discovery filed at
13 the FERC, and that could have been handled in that
14 fashion, so that was one of our concerns.

15 JUDGE WALLIS: Mr. Marshall, when will the
16 company be completing its filing of responses to
17 discovery requests at FERC?

18 MR. MARSHALL: FERC requests that Mr. Brena
19 made in his motion, I understand, is near completion by
20 the Washington D.C. side in the FERC proceeding, and I
21 don't know -- Patrick, do you know exactly the dates
22 that they determined that they would be able to serve
23 those answers?

24 MR. RYAN: No, I don't.

25 MR. MARSHALL: I think they are due at the

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1 FERC in the same time frame that they are due here, so
2 it should be today or the next available day.

3 MR. BRENA: Your Honor?

4 JUDGE WALLIS: Mr. Brena?

5 MR. BRENA: I was going to make one final
6 observation, and that goes to the last question you
7 asked Mr. Marshall, and I will read a sentence from
8 their FERC response to our discovery request: Olympic
9 will make a good-faith effort to respond to the request
10 by February 28th, 2002.

11 These were served on them the first of
12 February, so we have been informed that the FERC
13 discovery is not going to be produced until the week
14 before our case is due before the WUTC, so in terms of
15 coordinating counsel, I'm happy to do anything I can to
16 coordinate between Olympic's FERC and the state
17 counsel. We have a slightly different request on
18 slightly different time frames with slightly different
19 issues, but I would be happy to accept, to the degree
20 that they are duplicative, one response to both, but
21 I'm very uncomfortable with the idea of that response
22 being a month away from filing the request.

23 The final thing I would like to observe is
24 under the commission's regulations, if a party can't
25 respond in a timely fashion, by the 10 days, they are

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1 supposed to inform the requesting party within five
2 days of their inability to do that and request to
3 schedule and set forth a schedule when they can
4 respond, and any objections they may have are supposed
5 to be filed within that 10-day period.

6 We are in a situation where we have tried to
7 contact Olympic through e-mail and by phone, where we
8 have been told we will just take it up in the
9 prehearing conference, where we are perfectly willing
10 to prioritize depositions that are necessary and the
11 data requests that are necessary so that they can more
12 timely respond, if we can get to that, but we don't
13 seem to be able to -- today is the day that they are
14 all due. We didn't get any notice that they wouldn't
15 be able to respond, and they have served no objection,
16 and yet we have pages of motions here.

17 I am willing to, and when we get to the next
18 phase of this, I can identify 24 data requests for the
19 permanent case that we have to have before we file our
20 case and identify four that have great importance. It
21 has been two weeks or 10 days, and we haven't got
22 anything, and this is pressuring our schedule a great
23 deal. We served these on 2/1/02 and have gotten
24 absolutely nothing.

25 So to me, a rational place for this

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1 conversation to proceed is how can the parties reach
2 agreement, and in what time frame will Olympic respond
3 so that the information that is necessary to the staff
4 and the intervenors to put together their direct case
5 is put to them in a timely fashion, and as I said, we
6 are a week after those dates now, and FERC counsel is
7 saying it will be the end of the month. So I would
8 like to get to what it is we need and perhaps use Your
9 Honor as a facilitator to get the discovery that we
10 need identified and produced and so have the high
11 priority discovery produced ASAP, and then as I
12 mentioned, some of the discovery can lag, but there
13 certainly seems to be no conflict with what their FERC
14 counsel is doing. They are saying we are not going to
15 get any of these things until the end of the month.
16 They are all due today on the state side.

17 JUDGE WALLIS: Thank you, Mr. Brena.
18 Mr. Finklea, what do you think of all this?

19 MR. FINKLEA: I do think we are going to need
20 time. I don't know that we are going to need as much
21 time as what Olympic has suggested, but given the
22 commission's schedule, it sounds like something in
23 between is going to be difficult to accomplish as well.
24 So we have found that given the status of data request
25 responses thus far, we cannot meet the current

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1 schedule, and I don't know if we can even meet a
2 schedule that would be just a couple of weeks. It
3 depends on how quickly responses to data requests come
4 in. I know I will have an opportunity this afternoon
5 to speak with my client. I don't think that Tosco
6 would be troubled by the schedule slipping to December,
7 but I'm not certain.

8 JUDGE WALLIS: Mr. Finklea, I'm also having
9 trouble hearing you in places.

10 MR. FINKLEA: My bottom line is I don't think
11 that Tosco would be troubled by the schedule slipping
12 as late as a hearing in December and working backwards
13 from that, but I'm not positive of that. I do know
14 that given the current status of things, even meeting a
15 deadline in mid March is going to be hard.

16 JUDGE WALLIS: Mr. Trotter?

17 MR. TROTTER: Thank you, Your Honor. It was
18 our motion that put all this in motion, but just a
19 couple of comments. Number one, I think in my entire
20 career involving the commission, I have not had, both
21 from staff and me personally, a higher sense of
22 frustration in terms of getting data from any regulated
23 company in my 20-plus years experience.

24 The discovery that was due last Friday, I
25 also had no contact from the company regarding its

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1 status. We have discovery due today. We've had no
2 contact from the company regarding its status other
3 than to say I did hear from Mr. Ryan yesterday, I
4 believe, that our discovery that was due last Friday,
5 they hoped it would be in our hands next Wednesday. We
6 were pointing towards depositions the week of the 25th.
7 I was not able to get confirmation of that informally,
8 so I made a motion regarding it, but it does appear
9 that depositions that week just simply can't happen.

10 So we agree with those that believe that
11 simply the reality is that we can't get there from
12 here. But the problem is, in part, we are not
13 convinced that Olympic is doing all it can to get us
14 the data we've asked for. For example, one of our DR's
15 that was due last Friday simply asked them to provide
16 any work papers that have yet to be supplied that were
17 prepared by any other witnesses. We asked for sample
18 representative copies of certain documents. We asked
19 for the definition of specific terms and specific
20 testimony. We asked for a price that Mr. Schink used
21 in his competitive analysis. Others were more
22 detailed, but some of these were very straightforward
23 and should have been able to be responded to directly
24 by now. So we are concerned even under the company's
25 proposal if we start in July that we are not going to

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1 get the same sort of problem.

2 Our staff has tried to work very closely with
3 company personnel in terms of negotiating what
4 information they have, to ask them for information in
5 the format in which they have it to speed up and
6 streamline the process, and that process itself had
7 many delays in it. I think, if I sensed from
8 Mr. Finklea's or maybe Mr. Brena's comment, that we
9 need a special master to just get the parties in a room
10 and go through, What do you really need and what can
11 you provide and when can you provide it. I think it's
12 unprecedented in commission history, but I think we're
13 at that point. Something has to be done to move this
14 process along.

15 I haven't had a chance to review the
16 company's specific proposal and talk to staff. We have
17 retained Mr. Twitchell, who has a former employee who
18 is back working at the commission. The number of hours
19 he can work are limited, so we need to work that
20 through as to his availability and some other things,
21 but certainly, some combination of a special master and
22 shifting of the schedule is necessary under any
23 circumstances. We are at the end of our rope in terms
24 of trying to work things out. The company is being
25 cooperative at some levels and at other levels they

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1 aren't. We appreciate what we've got and we appreciate
2 the level of cooperation, but it has to be better, but
3 some combination of schedule change needs to occur for
4 us to file a case.

5 So we will consider the company's proposal
6 over the weekend and have something for you
7 definitively next week on that, but this motion is also
8 one of the few I've ever filed in terms of getting the
9 company to the table to say, "We have a problem. Let's
10 get it done and get it resolved." I don't file these
11 motions at the drop of a hat, so it is a problem. We
12 need to address it, and we need to get the data that
13 the parties need, and right now, we don't have it.

14 JUDGE WALLIS: I have some very deep concerns
15 about the company's ability to respond to data
16 requests. We discussed this at some length in the
17 interim proceeding in the discovery phase. I have to
18 say that in my years with the commission, I have never
19 been asked to participate at the level needed in the
20 interim docket to produce results in terms of
21 discovery, and I have never seen a company as
22 challenged as Olympic appears to be in its ability to
23 provide answers to discovery.

24 In particular, I'm gravely concerned by the
25 company's either inability or unwillingness to follow

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1 the admonitions of the commission and the provisions of
2 rules that require the company to respond to data
3 requests in a timely way and to respond in a more
4 abbreviated time frame when the company knows that it's
5 going to have problems or when the company has
6 questions or when the company has objections, and the
7 company did not do this during the interim phase and
8 again appears not to be doing this. Mr. Marshall, what
9 can we do about that?

10 MR. MARSHALL: Your Honor, I agree with a lot
11 of what's been said about the challenges here. Olympic
12 is challenged physically in trying to be able to do
13 this at both levels, at the FERC and WUTC level. We
14 have a company that the commission on its January 31st
15 order acknowledged has a dire financial emergency
16 facing it, and it still does.

17 It has a limited number of people that are
18 knowledgeable enough to respond to data requests. I
19 could tap them on the fingers of one hand, and you all
20 know their names - Cindy Hammer, Bob Batch, and Howard
21 Bach (phonetic.) The ability of anybody else to come in
22 and try to help sort out the financial data and
23 operational data are limited. People could talk about
24 the shareholders of Olympic are large companies, but
25 that is only something that I think for argumentation

01337

1 by intervenors --

2 JUDGE WALLIS: Mr. Marshall, I'm going to
3 interject here and ask you to address the concerns that
4 I raised. I think that everyone understands the
5 context of the company and the number of regular
6 employees that may be involved in some of the responses
7 to the data requests, but you indicated earlier that
8 you didn't even know that there was duplication until
9 last week when you talked with counsel at FERC or saw a
10 reference to FERC requests.

11 You did not respond to why you haven't been
12 communicating with other counsel in terms of explaining
13 that there would be delays, identifying the particular
14 discovery requests that would be subject to delay,
15 talking about alternative schedules, or otherwise
16 attempting to facilitate. Instead, you have failed to
17 comply with our requests, and you have failed to comply
18 with the rule, and you've deferred matters until today
19 in a situation in which you are aware that the other
20 parties require the information in order to prepare for
21 the case on the schedule that you have agreed to.

22 So I just do not understand why, even given
23 the challenges that the company faces, you are not
24 interfacing with other counsel and facilitating the
25 company's response to these requests. Not all of the

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1 requests require the personal attention of individuals.
2 Some of them, at least according to my quick review of
3 Mr. Brena's list of questions, are matters that any
4 person could provide with access to the document
5 library of the company.

6 Olympic itself has a relatively few number of
7 employees, but Olympic's owners and its manager, BP,
8 have considerably more resources and could, if desired,
9 devote those resources to responding to discovery. So
10 I'm just asking you why things are proceeding in this
11 manner and what we can do in order to facilitate a
12 better record of response.

13 MR. MARSHALL: I think there has been every
14 effort on the part of Olympic people to try to respond
15 as much as they can, and I think perhaps they thought
16 they could do more in limited time, and then I think
17 what happened is that at some point, they just got
18 overwhelmed. While they were working on one set of
19 answers, another wave would come and then another wave,
20 not only here, but by Tesoro, Tosco, by staff, and the
21 FERC.

22 I think it's the accumulative impact that's
23 finally made everything bog down and break down, and I
24 know that this is an unusual set of circumstances, and
25 I've never seen a set of so many data requests coming

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1 from so many different sides on so much detail over
2 what is a request for an additional nine million
3 dollars a year in rates at a time when Olympic is
4 struggling to do other things as well as organizing its
5 finances, including filing the motion that we filed,
6 and to figure out whether we can meet the schedule
7 deadline.

8 I think what we filed here today is an
9 admission that Olympic cannot physically respond, and
10 it wasn't made light of. It was made under
11 consultation with the board of directors where we
12 looked at all the opportunities to try to figure out
13 how can we possibly get on top of all these requests
14 that are coming in and do it, and the answer is that
15 physically, we could not possibly do it. The people
16 that are trying to do it, Ms. Hammer, Mr. Bach,
17 Mr. Batch, are at their rope's end too, and they
18 finally informed us here not too many days ago that
19 they just would be unable to proceed with all these new
20 data requests coming in, and after that, they continued
21 to get more.

22 All I can say is there comes a point where
23 the cumulative effects of all these requests is
24 physically unable to be handled. I agree that I wish
25 that we had a little better communication then we have

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1 been able to have, and we accept the responsibility for
2 that to inform people we were getting overwhelmed.
3 During the interim case, we faced similar things with a
4 three-day turnaround, and we tried and strove highly to
5 respond to everything that people had without trying to
6 make that delayed, as we ultimately delayed part of
7 that as well.

8 But I agree. I think that the type of
9 discovery that's being requested, each individual
10 request may be fine standing alone, but the cumulative
11 impact has frankly been completely overwhelming, and
12 frankly a little bit of pressure too. I think
13 Mr. Brena is right. They could have sequenced the
14 discovery in a much different way and focused on the
15 important discovery. We don't know. We don't know
16 what's in their mind and what's important to them and
17 what isn't, and Olympic has been trying to respond
18 broadly with the limited resources it has. Frankly, it
19 just cannot do that.

20 The reason why I think our proposed schedule
21 makes sense is because we would allow the FERC
22 proceedings to go forward. All that discovery would be
23 available. All the transcripts, cross-examination,
24 would be available for these parties, and if the
25 supplemental discovery cannot be conducted in the

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1 amount of time, which I think it could be because we
2 would have at least one of these proceedings behind us,
3 I would be very surprised that there would be anything
4 left to talk about other than to methodology. All the
5 facts, all the operational facts and the facts that
6 concern finances would be discovered and fully explored
7 in the first proceeding. I think that's the best way
8 that Olympic can think about in having to respond to
9 these multiple requests by multiple parties, including
10 FERC staff --

11 JUDGE WALLIS: Mr. Marshall, we cannot hear
12 you.

13 MR. MARSHALL: My last comment was we not
14 only have Tosco and Tesoro making requests and FERC,
15 and many of the requests are different from Tosco than
16 the FERC and may be duplicative by Tesoro, but we also
17 have FERC's staff making multiple requests of the
18 company, and I think the company is happy to spend an
19 inordinate amount of money over interim rate case and
20 the general rate case, and at the end of the day, there
21 really only are a few people that can respond
22 knowledgeably to this.

23 But you are right. This has led us to have
24 to make the admission that we cannot comply physically
25 with the schedule we thought would be appropriate when

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1 we started out in the filings last fall.

2 MR. BRENA: Your Honor, may I make an
3 observation? Your Honor, may I make one observation?

4 JUDGE WALLIS: I'm sorry. I heard you,
5 Mr. Brena. I'm thinking. Let me try one more time and
6 ask Mr. Marshall why you cannot, if the company
7 receives a data request that you know either upon
8 receipt or shortly after you cannot comply with, why
9 you are not able to advise the requestor and talk with
10 the requestor about scheduling that?

11 MR. MARSHALL: Your Honor, there isn't any
12 reason why that we couldn't. I think that the Olympic
13 staff has taken these data requests from both sets of
14 dockets. I think they've tried to do it --

15 JUDGE WALLIS: I'm not asking about Olympic
16 staff's ability to respond. I'm asking about your or
17 other counsel's ability to deal with the requesting
18 lawyers to give them a status and to inquire into
19 whether you can provide some data sooner as opposed to
20 later. What is the barrier to your or other counsel
21 complying with the commission's requests and the
22 commission rules that ask you to do that?

23 MR. MARSHALL: Again, until we hear from
24 Olympic as to whether they can or can't provide data, I
25 guess it's been our assumption that they could. That

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1 assumption has not proven to be correct, and we will be
2 more active in asking them outright. Given the huge
3 number of requests we have outstanding and the backlog,
4 the answer is we can't, and that's why we filed a
5 motion to limit discovery. We have been so overwhelmed
6 that there really isn't any prospect now until we get
7 the backlog worked out in being able to respond to
8 anything further backlogged.

9 I'm not arguing with Your Honor. I think
10 that it would have been better if two or three weeks
11 ago, we would have been aware that we would be in this
12 position, but the fact of the matter is we didn't have
13 that alert and couldn't do that, and it didn't come to
14 this stage until the people of Olympic finally said,
15 "We can't possibly do the work." That's when we
16 convened the board of directors to discuss what we
17 could possibly do, and they said we really have no
18 choice but to seek a change in schedule.

19 I think with the change in schedule, we will
20 be able to get on top of this, and we will make every
21 effort to comply with all of the rules that Your Honor
22 has mentioned. We do regret and we do apologize not
23 having been able to do this earlier, but there is a
24 situation where there is a vast number of outstanding
25 materials that just can't possibly be produced.

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1 JUDGE WALLIS: Thank you, Mr. Marshall.

2 Mr. Brena?

3 MR. BRENA: Your Honor, I was going to make
4 three observations, really. One is that Olympic has
5 not responded or has not served Tesoro to a single data
6 request on the FERC side, not one. Staff on the FERC
7 side served their data requests on the 16th of January,
8 and on either side, either the FERC or the WUTC side,
9 they have not responded to a single request by Tesoro,
10 and I would point out that, for example, to read one
11 request regarding DJT-1-T, Page 15, "State whether Page
12 15 of Mr. Talley's testimony is the final page thereof
13 and the answer ending on Line 17 completes his direct
14 testimony." You couldn't tell by looking at it if that
15 was the final page of his testimony, so we just asked
16 that.

17 One more observation. Olympic has not been
18 similarly constrained when it comes to the time of
19 their advancement of their own case or their own
20 motions. They have filed volumes of information taking
21 hundreds of man-hours of work when it comes to
22 advancing their position in these cases. It only is
23 when it's coming to respond to provide the information
24 so we can respond to that case that they seem to have
25 this constraint on resources, and then my final

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1 observation is even assuming that they've got hit with
2 too many discovery requests, I'm happy to, and
3 routinely do with my practice, sit down with counsel
4 and tell them what's important and what's most
5 important and try to negotiate so that they can focus
6 their resources on what's most important in order to
7 advance the case, and I'm prepared at this hearing to
8 list off 24 data requests that are of our highest
9 importance that we need to move forward and to identify
10 four which are very, very important within that total
11 of 24, and to prioritize the depositions by the party
12 that we need to depose.

13 We need to get there, and the answer isn't
14 put it all off for six months, because the same thing
15 is happening on the FERC side. Not a single data
16 request on the FERC side has been responded to, and
17 they've indicated that it will be the end of the month
18 before they are able to. There is no excuse, and we
19 need your assistance to advance this case, and the
20 issue is not schedule. The issue is responsiveness.

21 JUDGE WALLIS: Thank you, Mr. Brena.
22 Mr. Trotter suggested the possibility of a special
23 master. I'm not sure that the commission has the
24 resources to provide a special master, but I would like
25 to hear the intervenors and Mr. Marshall address that

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1 suggestion.

2 MR. FINKLEA: Your Honor, I think that it may
3 have some merit, and the alternative is we have to
4 continue to take as much of your time as we had to in
5 the interim. I, for one, found that to be a rather
6 tasking process, and I'm sure you did as well. If
7 there is someone who could facilitate in resolving some
8 of these discoveries quicker, even if we do have a
9 substantial slip in schedule, I think that Mr. Brena is
10 correct that -- and find ourselves in July or August
11 where we are today of not having answers and just
12 having deadlines that have been pushed off and still be
13 in the same situation.

14 I hope that if we are going to slip the
15 schedule, it would mean we are really getting answers
16 and enable the intervenors and staff to put a case
17 together that isn't so rushed and isn't being done
18 where you have the data one day and have to turn around
19 and produce testimony just a few days later. So I
20 think the special master might help.

21 JUDGE WALLIS: Mr. Brena?

22 MR. BRENA: I believe that Mr. Trotter's
23 comment was picking up from a suggestion that I had
24 that somehow we find a way to utilize you as a resource
25 to advance discovery. I would be a little bit

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1 concerned with bringing in somebody who was not
2 familiar with the case given the compressed nature of
3 the existing schedule, someone who is less familiar
4 with the issues than Your Honor.

5 I think that by using the mechanism of a
6 prehearing conference and by using you as a resource, I
7 can sit and go through my 70 data requests in half an
8 hour and explain why I need 24 of them right now and
9 set a schedule, and we can do that in the next hour.
10 We can do that in the next half hour probably, so I
11 think that some mechanism is absolutely essential,
12 because this idea of serving data requests and not
13 getting anything back and then having to come before
14 Your Honor --

15 We don't even have objections. We don't have
16 anything, and everything is due today. So this is not
17 working, and obviously, the 4th is not a date that is
18 going to work on this schedule, so I would support that
19 if there is a constraint on the commission's resources,
20 I think that asking you through a prehearing conference
21 to sit and to decide these issues and get the case
22 moving in terms of discovery would be completely
23 appropriate.

24 The other thing I would point out is that if
25 the commission held that they had to respond to these

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1 24 data requests or their case would be dismissed by a
2 certain date, there is no doubt in my mind whatsoever
3 that they would respond. So at some point, we need to
4 discuss what an appropriate sanction is for this. We
5 went through five or six prehearing conferences on the
6 interim case in which we did not get the information
7 which Your Honor ordered them to produce.

8 We had six business days, including over
9 Christmas and New Years, to put together our interim
10 case. Now, here we are. We are doing it again, and
11 this time it's the permanent case, and this time, the
12 justification that the interim rates should -- that
13 somehow an interim proceeding is not as heavily looked
14 into. We are in the permanent case now, and we are
15 supposed to have this information and have the ability
16 to advance it to the commission.

17 So to answer directly, I think it's something
18 that we should do at prehearing conferences now rather
19 than put in place a different mechanism and introducing
20 a new personality. That would be one not familiar with
21 the issues. I think it could be done efficiently. The
22 problem is these are solvable problems. The problem is
23 nobody is working on their solutions.

24 JUDGE WALLIS: Mr. Marshall?

25 MR. MARSHALL: I think we proposed a solution

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1 here on the schedule that will take care of these
2 problems. The problem is the physical inability of
3 Olympic to respond to all of the requests that we are
4 getting in a timely way. There is no doubt about it.
5 We admit it. We can't keep the schedule because we
6 can't meet all of the data requests that are being
7 required in a timely way.

8 It is our issue, and we would like to have an
9 order on August 1st on two rates. We truly believe we
10 will be granted that rate increase. To have to push
11 this off is sanction enough, because we won't get the
12 full rate increase on August 1st that we are seeking to
13 get at a later date. Believe me, Olympic is in such
14 financial need that this was a major consideration by
15 the board of directors. How can we do this with only a
16 third or less of the ultimate rate that we are seeking
17 be allowed in interim of where we have all these needs?

18 If Olympic could do more, it would do more,
19 and the board has come to the conclusion that
20 physically they cannot do more, and I would agree that
21 if following the FERC proceeding there is any hint that
22 we have any trouble supplementing discovery between the
23 conclusion of that hearing and the beginning of the
24 WUTC hearing that we would be the first to say, Let's
25 provide whatever additional resources the commission

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1 would need, including a special master.

2 But I think the sanction is already there for
3 Olympic having to delay. We also had to delay the
4 interim case. We didn't want to do that either, but
5 much of the requests we've got on the interim case were
6 on issues that the commission itself and the board of
7 directors felt are appropriate for the general rate
8 case. We spent an awful lot of time on responses over
9 that same holiday period, and at this event, they
10 could, and at every turn, we have had the same problem.
11 We physically could not respond any faster than the
12 people were able to respond.

13 I can't respond to what Mr. Brena says about
14 what's happening at the FERC; although, I'm going to
15 make calls following this to find out what the status
16 is. Mr. Brena has spoken with counsel back there about
17 these briefs, and I will make every commitment to find
18 out why there may be any issue there. But I think it's
19 the same question. We have the ability to respond to a
20 certain number of data requests. One example he gave
21 may be an easy one, but I'm not sure that's not his
22 priority. I'm sure he would rather have us working on
23 some other responses.

24 So again, I guess to sum it up, the sanctions
25 to Olympic are that it's going to be delayed in getting

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1 the rate increase it desperately needs to fix the
2 financial situation it finds itself in. If it could do
3 more, it would by all means do more.

4 JUDGE WALLIS: Mr. Trotter, is the staff in a
5 position to identify priorities among its data
6 requests?

7 MR. TROTTER: Yes, it is, Your Honor.

8 JUDGE WALLIS: I'm going to make some
9 observations based on the experience that we've had in
10 the earlier phases and my understanding of the
11 commission's order on the interim proceeding, and then
12 I'm going to take a brief recess, and when we come
13 back, I would like you to go through the priority
14 requests that you have, first Mr. Brena, then
15 Mr. Finklea, if you are in a position to do so, and
16 then Mr. Trotter.

17 The commission is, I think it's fair to say,
18 gravely concerned with the condition of the company and
19 the representations the company has made about its
20 challenges in gaining the funding to provide the safety
21 and the service that it is required to. The interim
22 order did identify a number of matters which the
23 commission did not feel able to resolve in the interim
24 proceeding but that remain to be resolved in the
25 general.

1 The commission is very much concerned about
2 scheduling and believes that especially now that an
3 interim level of rates has been authorized that it
4 proceed expeditiously to resolve the matter. The
5 question may arise about the extension of interim rates
6 in an extended continuance such as the company has
7 requested, and particularly looking at our schedule in
8 identifying what appears to be a reasonable time to
9 address the complex information, the complex issues,
10 the extensive information that appears to be necessary
11 to resolve those issues.

12 So the commission, I believe, would be
13 looking for the opportunity to resolve this either on
14 the existing schedule or on a more expedited schedule
15 than has been proposed. In looking at the calendar, it
16 may be that there would be the opportunity in June for
17 a hearing on this matter if other things fall into
18 place. I am going to schedule a prehearing conference,
19 and during our brief recess, we will identify a time
20 and place to do that, to address the concerns that the
21 parties have raised today.

22 Mr. Marshall, I find your representations
23 about the company's inability to respond to be not
24 entirely credible, because I do believe that it is
25 possible, number one, even with limited resources, to

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1 prioritize requests, to take a look at requests and
2 identify that a response cannot be made in the time
3 requested, to talk with counsel, opposing counsel, to
4 negotiate what is important and to provide it, and I
5 simply, even after listening to your response, don't
6 understand why it is that you have not done that.

7 I believe that it would be possible if the
8 parties provide their priority requests to you today,
9 as I am asking them to do, that by the end of next
10 week, you can accomplish several things. I believe
11 that you can organize the responses, particularly if
12 you are coordinating with the responses to FERC data
13 requests, understanding that some of the parties are
14 common to that proceeding, and that you can make
15 significant headway in responding to the requests not
16 only of the staff but of the intervenor. I do not
17 understand why you are unable to respond to the
18 intervenors' requests as well as those of other
19 parties. So I'm going to ask that by the time of our
20 next prehearing conference, the company will have
21 examined the priority requests, will have made a
22 significant start, significant progress in providing
23 the answers, and will be able to respond to the status
24 of those answers that have not yet been provided.

25 Now Mr. Brena, in looking at your data

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1 requests, it appears to me that some of them are
2 awfully broad and may exceed the scope of even the
3 general proceeding. I think it is important for you to
4 identify those matters that are important to your case
5 and to limit the discovery acknowledging the company's
6 challenges in terms of its key people to respond to
7 some of those data requests. We will to the extent
8 necessary go through the data requests at the ensuing
9 prehearing conference, and I will ask you in the
10 meantime to do a scrub of your data requests, the ones
11 that are not amongst your priorities, to recognize that
12 this is not litigation in civil, state, or federal
13 courts, and that we do have a limited time frame and
14 that there must be some reasonable limitation upon the
15 extent and the nature of the information that is
16 sought, so I'm going to ask you to do that. Is there
17 anything else? I believe that's all.

18 I would like to take a recess at this point
19 for about 15 minutes, and then when we return, I would
20 like Mr. Brena to identify his priority requests and
21 Mr. Trotter to identify his and then take up any
22 further matters that the parties wish to address.

23 MR. FINKLEA: Your Honor, I don't know that I
24 can identify my priority ones today, but I certainly
25 could by the time of our next conference.

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1 JUDGE WALLIS: Thank you, Mr. Finklea. I
2 would like to acknowledge that the company has filed a
3 petition for reconsideration of the commission order on
4 the interim, and that today, the commission did invite
5 other parties to respond to that petition for
6 reconsideration. I don't know if that invitation has
7 reached you yet, but I alert you to that, and the time
8 frame for a response, I believe, is a week from Monday
9 or the 25th, I believe, of February. With that, let's
10 take a 15-minute recess, and then we will return.

11 (Recess.)

12 JUDGE WALLIS: Let's be back on the record,
13 please. I would like to take up the prioritizing of
14 discovery requests. I was not able to find a date
15 during the recess, but I will renew my efforts
16 following the hearing and do my best to get a notice
17 out to folks as soon as possible. I aspire to doing
18 that by the close of business today. If not -- not all
19 of the staff here will be working on Monday, but I will
20 see that it's out by Tuesday. I'm looking at the
21 possibility of Thursday or Friday of next week or as
22 soon thereafter as may be possible.

23 Also during the recess, I reflected upon a
24 question that I raised early on and I would like the
25 parties to do some thinking about. I'm not calling for

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1 an answer immediately, but that was how to secure
2 compliance with the requirements that the commission
3 has established, either by rule or by order, and what
4 consequences might flow from failure. The entry of
5 orders is one mechanism. The enforcement of orders in
6 Superior Court is another. The issuance of penalties
7 for failure to comply is another, and in an extreme
8 case, I could even envision the possibility of
9 dismissal of a party from the proceeding.

10 The rule talks, amongst other things, of
11 finding facts against the person who fails to respond
12 to a discovery request. There may be others, and I'm
13 asking parties to do some thinking about that topic so
14 that in the, I trust, unlikely event that we come to
15 making that inquiry, parties will be prepared to
16 respond, and the commission will have the benefit of
17 your observations, any authority that you may wish to
18 provide, and any further information you may wish to
19 provide on that topic.

20 Let's take up with Mr. Brena at this point,
21 and I would ask you, Mr. Brena, to identify the items
22 that you believe are priority items for the preparation
23 of your case. If you can do so merely by identifying
24 these by number, I believe that would be sufficient for
25 our purposes. Mr. Marshall or Mr. Ryan, if the mere

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1 statement of a number causes you any concerns or if you
2 have questions, please feel free to ask those
3 questions. Mr. Brena, if merely stating the number of
4 a request isn't sufficient but you do have further
5 comment that would clarify it, please go ahead with
6 that.

7 If at the conclusion of the proceeding and
8 looking at the transcript when it comes in on Monday
9 you find that you do have questions, I'm going to ask
10 you not to wait until some later time or wait until the
11 time of a prehearing conference to ask those questions
12 and ask you communicate with each other about them.
13 Again, I am trusting that at the time of the prehearing
14 conference, we will be able to have a discussion about
15 the progress that's been made, and if the responses
16 have not been made that we will have a schedule for
17 making them. At the time of the prehearing conference,
18 we can discuss in greater detail the scheduling,
19 whether this matter could be rescheduled for the June
20 time frame, or whether the December time frame, if it
21 is rescheduled, what conditions or consequences might
22 flow from that, particularly relating to the status of
23 the interim proceeding during that time frame.

24 So with that, let's move to Mr. Brena.
25 Mr. Brena?

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1 MR. BRENA: Thank you, Your Honor. First,
2 let me just make one brief comment --

3 JUDGE WALLIS: Mr. Brena, before the break,
4 we were able to hear you loud and clear and it was just
5 wonderful. Right now, I'm having a little bit of
6 trouble tracking you, so I'm going to ask you to revert
7 to your pre-recess voice.

8 MR. BRENA: Is this better?

9 JUDGE WALLIS: Much better.

10 MR. BRENA: First I would just like to point
11 out to the commission and Your Honor that I started out
12 with 140 data requests by all my experts that they said
13 they needed in this case, and we submitted 71
14 ultimately, which is fewer than we did for the interim
15 case and which is fewer than what staff had. So within
16 that 71, these are the 24 which are of critical
17 importance that we need in order to prepare our case.
18 By identifying these 24, I'm in no way trying to say we
19 do not need responses to the remainder of the 71. I'm
20 just saying these are the most important that we need
21 in order for us to prepare our case.

22 JUDGE WALLIS: Thank you, Mr. Brena, and I
23 believe if I recall correctly, you earlier indicated
24 that even amongst the others there might be priorities,
25 and I would ask you to be prepared at the time of the

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1 prehearing conference either to distribute that
2 information via electronic means or to respond to it at
3 the time of the conference.

4 MR. BRENA: I would be happy to. First, Data
5 Request 102, and I would note in 102-C, which is
6 produce all engineering studies and documents that
7 discuss the design and capacity of the system. Next,
8 108.

9 MR. MARSHALL: Does "design capacity" mean
10 the duplicate --

11 MR. BRENA: 102, and I draw particular
12 attention to 102-C.

13 JUDGE WALLIS: A couple of questions here,
14 Mr. Brena. By drawing attention to 102-C, what does
15 that mean?

16 MR. BRENA: You asked me if the number was --
17 in and of itself, I didn't feel it was sufficient to go
18 ahead and add an additional comment.

19 JUDGE WALLIS: Does that mean that you are
20 not asking for the other elements of 102 but only C?

21 MR. BRENA: No. I'm asking for all of 102
22 and just noting C --

23 JUDGE WALLIS: Excuse me, Mr. Brena. There
24 was a comment or question -- I'm not sure if it was
25 from Mr. Ryan or Mr. Marshall -- that I found to be

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1 inaudible, even though that I could hear there was a
2 comment. So I would ask that you repeat that for the
3 court reporter and identify yourself, please.

4 MR. MARSHALL: My question was whether that
5 related to the capacity of the system, and Mr. Brena
6 responded, yes, it did.

7 JUDGE WALLIS: Thank you. Mr. Brena, 108?

8 MR. BRENA: 108, 109, 110, 112, 114, 116,
9 117, 119, and let me emphasize 119. Even within the
10 24, 119 is a very important request to us. That's the
11 financial monthly accounts and records; 120, 121, 122,
12 123, 125, and let me again emphasize that 125 is also
13 of great importance even within the 24; 126, 127, and
14 127 is the third one of great importance even within
15 the 24; 131, 132, 133, 158, 164 --

16 MR. MARSHALL: If you could slow down. We
17 are jumping pages now. Could you please go back?

18 MR. BRENA: What's the last one you have?

19 MR. MARSHALL: 133.

20 MR. BRENA: 158, 164, and 166, is the fourth
21 one that I would like to highlight, and I would note
22 that in the hearing, Exhibit No. 40 identified a
23 spreadsheet which identified each project and the
24 identified one-time costs and had a complete
25 spreadsheet, and what we've asked for is everything in

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1 the path, everything in the electronic path to be
2 transmitted to us in electronic format because those
3 are so hard to read, but everything within that entire
4 path that it be identified electronically and in hard
5 copy transferred; 168, 169 and 170.

6 MR. MARSHALL: Do those encompass every
7 subpart of every one of those requests?

8 MR. BRENA: Yes, they do.

9 MR. MARSHALL: Your Honor, we would like a
10 ruling that all data requests that have subparts be
11 separately numbered. As the rules provide in civil
12 court, subparts should be standing alone as data
13 requests. I think you find that maybe we have 24
14 requests here, but there are probably more like 120
15 requests when you include all the subparts.

16 MR. BRENA: Your Honor, such a ruling would
17 be very awkward when you are dealing with one subject
18 matter and you are breaking down into specific detail
19 what you want out of that subject matter. Breaking
20 that into separate requests would not be very
21 efficient.

22 JUDGE WALLIS: I think that ultimately our
23 concern is with the nature of the information that's
24 requested rather than how it is enumerated, and I think
25 that if it is necessary to take this question further,

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1 we or the commission would be looking at the nature of
2 the information requested rather than what numbers are
3 attached or how they are lumped together. It appears
4 to be logical and convenient to lump together items
5 that relate to the same topic or the same document, so
6 with that, Mr. Marshall, I'm going to deny your request
7 but reassure you that ultimately should matters require
8 further consideration, we would not be looking to the
9 mere numbering alone. Mr. Brena, does that conclude
10 your list?

11 MR. BRENA: It concludes my list, and I would
12 just add as a comment that when they work through that
13 list of 24, if there is an interpretational or other
14 question that I may help them with, I would be more
15 than happy to, and I will make myself available at
16 their convenience.

17 JUDGE WALLIS: Thank you. Do you intend to
18 be in your office on Monday?

19 MR. BRENA: I will be in my office, and I
20 would also be willing to provide my cell phone.

21 JUDGE WALLIS: Mr. Trotter?

22 MR. TROTTER: I would list the following as
23 priority items, and I will say, there were some data
24 requests that Mr. Brena issued that we would like. I
25 didn't have a chance to get through all those, so I'm

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1 just going to issue the staff DR's: 322, 326, 331
2 through 333, 340, 341, 347, 357, 358, 361 through 365,
3 367, 369, 371, 374 through 379, 381, 383, 384, 390, 392
4 through 398, and 400 through 403. That completes my
5 list.

6 JUDGE WALLIS: Thank you. Did I hear a
7 comment or question from the company?

8 MR. MARSHALL: The only question was how many
9 does that total?

10 JUDGE WALLIS: We can't hear you.

11 MR. MARSHALL: The question was how many is
12 that total?

13 MR. TROTTER: I believe 34, and Your Honor,
14 as I indicated earlier, the company committed to me
15 yesterday that our Data Requests 322 through 359 would
16 be responded to by next Wednesday, and some of them I
17 highlighted were in this series, so I assume those are
18 on track, in any event.

19 JUDGE WALLIS: Thank you very much.
20 Mr. Marshall, I am going to ask you, suggest very
21 strongly that you take this information and consult
22 with the company. Because you are responsible for the
23 litigation, I would encourage you very strongly to talk
24 with the company about organizing its response to these
25 requests, talk with the company to identify the source

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1 of the data and its production, talk with the company
2 to identify a plan to get the information provided, and
3 emphasize to the company how significant this is to
4 their process.

5 The fact that you have data requests coming
6 in in the FERC proceeding and in this proceeding and
7 have limited resources does not of itself indicate that
8 you and the company are unable to respond, but what we
9 are looking for is some organization on your part and
10 the company's part to reassure us and the parties who
11 are entitled to receive information that you are
12 actively pursuing the responses to that information.

13 If there is a conflict between the FERC
14 proceeding and this proceeding, then I would encourage
15 you to engage in discussions with the company's FERC
16 counsel and with other parties to this proceeding who
17 may be involved in that or may be pursuing the same or
18 similar information and facilitate the opening of
19 communication amongst the parties to this proceeding
20 and the parties to that proceeding so that your
21 resources, limited as they may be, are better able to
22 produce responses to all of the requests that need to
23 be responded to.

24 MR. MARSHALL: Yes, Your Honor. We will
25 communicate in as strong as terms as we can.

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1 MR. RYAN: Your Honor, I'm stepping in here
2 just for point of clarification and not to be
3 argumentative, but I do note that Data Requests 384 to
4 389 are not currently due until the 22nd, and their
5 Data Requests 390 to 403 are not currently due until
6 the 26th, so in fashioning what you are indicating the
7 company should do here, I would hope that we can have
8 the leeway to focus on those data requests that are
9 currently outstanding and also acknowledge that
10 Mr. Trotter has indicated that the data requests do
11 have a priority here.

12 MR. TROTTER: Your Honor, we would be more
13 than happy to receive data requests on the date they
14 are due.

15 MR. RYAN: Very good. Thank you.

16 JUDGE WALLIS: I would also like to state
17 that if it is either necessary or appropriate that the
18 commission become involved in coordination amongst the
19 two proceedings to assure that the needs of the
20 proceedings are met but that the burdens upon the
21 parties are minimized, we would be willing to engage in
22 discussions aimed at achieving that result.

23 MR. MARSHALL: Thank you, Your Honor. That
24 would be very helpful.

25 JUDGE WALLIS: If you have a specific

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1 suggestion on how to approach that, if in discussions
2 with the other jurisdiction, if it appears feasible to
3 set up a joint conference, if that appears necessary,
4 and the parties are amenable to that, we will also be
5 able to facilitate it.

6 What we really want here is a proceeding
7 that, recognizing the challenges that the parties face,
8 does the best possible good-faith approach and does the
9 best possible in terms of achieving results of any
10 alternatives. So what we are after here is not to
11 punish anyone but to keep the proceeding on track, get
12 it on track if it's not for what everyone I believe
13 wants, and that is an early but a fair resolution of
14 the matter by the commissioners. So let me ask at this
15 juncture if there is anything further from the parties?

16 MR. RYAN: With regard to this topic or with
17 regard to this prehearing conference?

18 JUDGE WALLIS: With regard to the conference.

19 MR. RYAN: We have scheduling of the
20 depositions.

21 JUDGE WALLIS: Mr. Trotter?

22 MR. TROTTER: As I indicated in our motion,
23 we did have some preliminary discussions that did not
24 bear fruit that we were focusing on the week of the
25 25th of February for depositions. We did not get

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1 confirmation of that, and frankly, we are not proposing
2 that at this time because we need responses to data
3 requests in order to effectively use that tool. So I
4 think this is probably best taken up at our next
5 prehearing conference and see how we can move that
6 issue forward.

7 JUDGE WALLIS: Mr. Brena?

8 MR. BRENA: I agree with Mr. Trotter that the
9 use of a deposition is optimized after discovery has
10 been produced and you have an opportunity to depose the
11 party with the benefit of discovery. The problem I
12 have with sequencing anything after the production of
13 discovery is that I'm losing my optimism, and there is
14 some benefit to deposing witnesses to learn what
15 discovery is out there to be had. For example, I have
16 as close to the top of my list the people that I would
17 like to depose, Mrs. Hammer, who is in charge of the
18 accounting. Much of what we've asked for and
19 prioritized has to do with getting the financial
20 information from them that we need in order to
21 quantitatively analyze their cost in the test period.

22 It's nice to have that information and then
23 to ask her, but if this drags on too long, I would like
24 to just ask her what documents they have and what they
25 can produce off of their system because we are out

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1 there searching. We are not getting information back
2 with regard to what's available, and this is turning
3 into a very inefficient system. So I guess I would
4 support putting it off to the next prehearing
5 conference but not much long after that.

6 The final thing that I would like to say
7 would be that I would like an agenda item on the next
8 prehearing conference to be the discussion of
9 sanctions. I understood Your Honor to propose that we
10 consider that and be prepared to respond to that, but
11 at this point, if we are not getting responsive
12 discovery, we just need to talk about that, I think,
13 because no party can be expected to litigate an issue
14 without being given the information necessary to
15 litigate that issue, so at some point, you have to just
16 decide the issue. An issue of preclusion becomes
17 appropriate. Just the issuance of orders and the like
18 just doesn't work.

19 So I guess I would like to have that
20 conversation Your Honor suggested and be happy to put
21 this off with the understanding that the schedule would
22 be set in a fashion so that we actually get some
23 responsive discovery so we can get to these
24 depositions, and if we do not, then I would like to be
25 able to depose them and then have a continuing

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1 deposition after we get responsive discovery, and then
2 finally, as it stands, our case is still due March 4th,
3 and I don't believe anybody in this prehearing
4 conference has suggested that's a workable date at this
5 point. So I would ask your Your Honor to suspend that
6 date and to be considered in a future prehearing
7 conference.

8 JUDGE WALLIS: My preference, Mr. Brena,
9 would be not to suspend that date at this time but to
10 acknowledge the parties' observations that it appears
11 the date is not workable. My preference would be to
12 have some definite alternatives in mind before
13 suspending any portion of this schedule, and if at the
14 time of the next prehearing it appears that it is not
15 possible under any circumstance to meet that deadline,
16 then we will address the issue.

17 MR. BRENA: Your Honor, if I may, I have
18 experts working all weekend trying to meet that date,
19 doing everything they can in anticipation. One of my
20 experts has a brother who is ill who is visiting who he
21 was going to take part of the day off and go up and
22 visit, so I think that that date is completely
23 unrealistic at this point, and we have people -- we
24 won't even have depositions by that date the way this
25 is being proposed. It's not very cost-effective for me

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1 to be working my experts over weekends and through
2 those sorts of personal situations and demanding that
3 from them when nobody in this room considers that date
4 to be doable.

5 JUDGE WALLIS: This virtual room.

6 MR. BRENA: This virtual room, yes.

7 JUDGE WALLIS: Mr. Stokes, Mr. Trotter, do
8 you have observations?

9 MR. TROTTER: Your Honor, I think your
10 preference was fair, and I think Mr. Brena can make
11 practical application of what you said.

12 JUDGE WALLIS: Mr. Stokes?

13 MR. STOKES: I think we would prefer to have
14 that date stricken at this point because we also have
15 experts that are working trying to meet that deadline,
16 and I do agree that their efforts would be better
17 served if they are not spending the weekend trying to
18 meet a deadline that probably will not be required
19 anyway.

20 JUDGE WALLIS: For purposes of today's
21 conference, let's say that that date is extended one
22 week from today, and that's anticipating that we will
23 have the next conference within one week from today.

24 MR. BRENA: Thank you, Your Honor.

25 MR. STOKES: Thank you.

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1 JUDGE WALLIS: Mr. Marshall, Mr. Ryan, is
2 there anything further from the company?

3 MR. MARSHALL: No, Your Honor. We would just
4 like the parties to consider --

5 JUDGE WALLIS: Having trouble hearing you,
6 Mr. Marshall.

7 MR. MARSHALL: We would just like all the
8 parties to consider strongly the revision that our
9 motion to have the extension of the schedule. A lot of
10 these problems might -- with no way of the schedule, so
11 that's why we made it, and we comment that to all the
12 parties and in talking to our clients.

13 JUDGE WALLIS: Thank you very much,
14 Mr. Marshall, Mr. Ryan, Mr. Stokes, Mr. Finklea,
15 Mr. Brena, Mr. Trotter, Ms. Watson, and this conference
16 is concluded. We will by notice establish the time and
17 place for an ensuing conference.

18 I do want to call to the parties' attention
19 the difficulties that we have had just in hearing each
20 other and the challenges that that poses for us and the
21 court reporter. Recognizing the distances involved and
22 the difficulties, if it is feasible for parties to
23 attend or to have another representative present within
24 the hearing room, it can help to facilitate matters.
25 This conference is adjourned. Thank you all very much.

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(Prehearing conference adjourned at 4:17 p.m.)

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